

FILED
Court of Appeals
Division II
State of Washington
12/22/2017 2:00 PM
No. 50264-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SKYLAR R. SMITH,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES	iii
I. ISSUES.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	5
A. SMITH RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS	5
1. Standard Of Review	5
2. Smith's Attorney Was Not Ineffective During His Representation Of Smith Throughout The Jury Trial .	6
3. Even If Smith's Attorney Was Deficient For Failing To Object To The Admission Of Exhibit 3 For Failure To Sufficiently Establish Chain Of Custody, Smith Suffered No Prejudice.....	16
B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S FINDING THAT SMITH COMMITTED THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE – HEROIN.....	17
1. Standard Of Review	18
2. The Trial Court's Conclusion That Smith Possessed A Controlled Substance – Heroin Is Supported By The Evidence.....	18
C. THE STATE CONCEDES THE TRIAL COURT'S INQUIRY OF SMITH'S ABILITY TO PAY HER DISCRETIONARY LEGAL FINANICAL OBLIGATIONS WAS INSUFFICIENT	22
1. Standard Of Review	23

2. The Trial Court's Inquiry Was Not Sufficient For An Individualized Determination That Smith Had The Ability To Pay The Discretionary Legal Financial Obligations.....	23
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	24
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	8, 9
<i>State v. C.J.</i> , 148 Wn.2d 672, 63 P.3d 765 (2003)	23
<i>State v. Clark</i> , 191 Wn. App. 369, 362 P.3d 309 (2015)	23
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 893 (2006)	18
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	18
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.2d 410 (2004)	18, 20
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	7, 16
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011)	18, 19
<i>State v. Lui</i> , 179 Wn.2d 457, 315 P.3d 493 (2014)	8
<i>State v. Mathers</i> , 193 Wn. App. 913, 376 P.3d 1163 (2016).....	23
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	6
<i>State v. Picard</i> , 90 Wn. App. 890, 921 P.2d 336 (1998)	8
<i>State v. Rafay</i> , 168 Wn. App. 734, 285 P.3d 83 (2012)	14-15
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	6
<i>State v. Roche</i> , 144 Wn. App. 424, 59 P.3d 682 (2002)	9, 10
<i>State v. Smith</i> , 185 Wn. App. 945, 344 P.3d 1244 (2015)	18, 19
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	23
<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016)	23

<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	19, 20
--	--------

Federal Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970)	18
---	----

<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 327 (2009)	8
--	---

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)	6, 7
---	------

Washington Statutes

RCW 10.01.160(3)	24
------------------------	----

RCW 69.50.204(b)(11)	19
----------------------------	----

RCW 69.50.4013	19
----------------------	----

Constitutional Provisions

U.S. Constitution, Amendment XIV § 1	18
--	----

Other Rules or Authorities

ER 901	8
--------------	---

I. ISSUES

- A. Did Smith receive ineffective assistance from her trial counsel when he failed to object to the admission of Exhibit 3 for failure to establish sufficient chain of custody?
- B. Did the State present sufficient evidence to sustain the conviction for Possession of a Controlled Substance – Heroin?
- C. Did the trial court impose discretionary legal financial obligations on Smith without conducting the required individualized inquiry regarding her ability to pay?

II. STATEMENT OF THE CASE

On January 12, 2017, Sarah Lupio, Asset Protection Associate for Walmart observed Smith inside the Walmart store in Chehalis, Washington. RP¹ 16-19; CP 15. Ms. Lupio observed Smith take apparel items off the hangers and conceal them in a reusable bag Smith had brought into the store. RP 19; CP 16.

Smith left the store without paying for the clothing she placed in the reusable shopping bag. RP 20; CP 16. Ms. Lupio stopped Smith outside the store and Smith agreed to accompany Ms. Lupio back to office. RP 20-21; CP 16.

¹ There are two volumes of verbatim report of proceedings in this matter. One volume contains the trial confirmation hearing and the trial, and are continually paginated. The State will cite the trial volume as RP. The sentencing hearing is a separately paginated verbatim report of proceedings and the State will cite it as SRP.

Ms. Lupio recovered the unpaid for merchandise from Smith. RP 21; CP 16. The total value of the unpaid for merchandise was \$104.64. RP 24; CP 16.

Officer Sam Thayer from the Chehalis Police Department, arrived at the Walmart and arrested Smith. RP 25-26, 37-38; CP 16. Officer Thayer searched Smith's purse incident to arrest for Theft in the Third Degree. RP 42-43. Officer Thayer found a small pouch that contained hypodermic needles and a small plastic baggie with a brown tar-like substance. RP 42. The brown tar-like substance field tested positive for heroin. RP 57.

Officer Thayer transported Smith to the Lewis County Jail. RP 48; CP 16. Officer Frank, a corrections officer from the Lewis County Sheriff's Office, conducted a strip search of Smith at the Lewis County Jail. RP 72, 74-75; CP 17. While conducting the search a small clear plastic bag was located, stuck to Smith's left breast. RP 75; CP 17. Officer Frank requested Smith hand over the bag and Smith complied. RP 75. The clear plastic bag Officer Frank discovered contained a small pill sized round dot of some type of brown material. RP 75; CP 17. Smith told Officer Frank, "I forgot about that. That's all I have on me." *Id.*

Officer Frank immediately took the plastic bag and put it in her secure, locked gun locker in the booking area. RP 75-76; CP 17. There was no other evidence in Officer Frank's gun locker when she put the plastic bag collected from Smith inside the gun locker. RP 76; CP 17. No other evidence was added to Officer Frank's gun locker while the plastic bag collected from Smith was inside it. 76, 82; CP 17. With the exception of a supervisor, Officer Frank has exclusive access to her gun locker. RP 76-77; CP 17.

Officer Thayer returned to the Lewis County Jail to retrieve the plastic bag recovered from Smith during the strip search. RP 48-49. Officer Frank took the plastic bag out of the secure gun locker and gave it to Officer Thayer. RP 49; CP 17.

Officer Thayer sealed the plastic bag she obtained from Officer Frank in a plastic evidence bag. RP 50; CP 17. Officer Thayer marked the evidence bag containing the plastic bag obtained from Officer Frank as Item 1. RP 50-52; CP 17. Officer Thayer labeled the evidence bag with the case number 17B207 which corresponds to this case and also wrote Smith's name on the evidence bag. *Id.*

The evidence bag, Item 1 (admitted Exhibit 3) was sent to the Washington State Patrol Crime Laboratory for testing. RP 51; CP 17. Deborah Price, a Forensic Scientist for the Washington State Patrol

Crime Laboratory, tested the contents of the evidence bag marked as Item 1. RP 87, 96, 102-03; CP 18. Ms. Price cut the evidence bag on the bottom of the bag and then resealed the bag with evidence tape, signing her initials, and writing the laboratory case number over the seal. RP 91-92, 100; CP 18. Ms. Price noted that the evidence bag marked as Item 1 did not appear to have been tampered with and the original seal was still intact. RP 100-01; CP 18. Ms. Price tested the contents of Item 1 (Exhibit 3) which was found to contain heroin. RP 102-03; CP 18; Ex.1.² Heroin is a controlled substance. CP 19.

The State charged Smith with Count I: Possession of a Controlled Substance – Heroin, and Count II: Theft in the Third Degree. CP 1-2. Smith waived her right to a jury trial and proceeded to a trial by the bench. RP 4-7, 10-11; CP 10. The trial court found Smith guilty as charged. RP 127-29; CP 19. Smith was sentenced to 30 days in jail. CP 23. Smith timely appeals her conviction. CP 29-37.

The State will supplement the facts as necessary throughout its argument below.

² The State will be submitting a supplemental designation of Clerk's papers to include Exhibit 1, the crime laboratory report.

III. ARGUMENT

A. SMITH RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Smith's attorney provided competent and effective legal counsel throughout the course of his representation. Smith argues by failing to object to the chain of custody of Item 1 (Exhibit 3) Smith's counsel's performance was deficient. Smith argues there was insufficient chain of custody, therefore a proper objection to the evidence being admitted would have been sustained, and Smith has therefore been prejudiced. Brief of Appellant 7-9. Smith's arguments fail when the testimony of the State's witnesses and the evidence is considered in totality. Further the trial court's oral ruling show that even if there was a deficiency in the performance of Smith's trial counsel, there was no prejudice. Smith's attorney was not ineffective and this Court should affirm Smith's conviction for Possession of a Controlled Substance - Heroin.³

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered.

³ Smith only argues that her felony conviction should be reversed in her arguments to this Court.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)
(citations omitted).

2. Smith's Attorney Was Not Ineffective During His Representation Of Smith Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Smith must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant

was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Smith argues there was insufficient evidence presented to the trial court to establish sufficiently the chain of custody for Item 1 (Exhibit 3), the bag containing heroin that was found on Smith’s person during her search at the Lewis County Jail. Brief of Appellant 7-9. Smith asserts that because Officer Thayer did not include information in her police reports regarding retrieving the bag from Officer Frank and Officer Frank did not recall handing the bag directly to Officer Thayer the State failed to establish chain of custody. *Id.* Smith also asserts the State failed to establish chain of custody by failing to bring in the evidence technicians for Chehalis Police Department and the Washington State Patrol Crime Laboratory, and the State did not bring in anyone from the Vancouver Crime Laboratory. Smith argues by failing to object to the admission of the evidence, citing chain of custody, Smith’s trial attorney was ineffective. Smith’s arguments fail.

Prior to admitting a piece of evidence the party asking the court to admit the evidence must sufficiently identify or authenticate the evidence. ER 901. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a).

A party can sufficiently establish chain of custody to satisfy the foundational requirement to admit an exhibit even absent proof of an unbroken chain of custody. *State v. Picard*, 90 Wn. App. 890, 897, 921 P.2d 336 (1998). The object must be satisfactorily identified and there must be evidence that it is in substantially the same condition as it was when it was collected. *Picard*, 90 Wn. App. at 897. It is not required to have every single person who has ever laid hands on the evidence be called to establish the chain of custody. *State v. Lui*, 179 Wn.2d 457, 481, 315 P.3d 493 (2014), citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 174 L. Ed. 2d 314, 327 (2009).

As the Supreme Court stated in *State v. Campbell*:

The jury [,or judge,] is free to disregard evidence upon its finding that the article was not properly identified or there has been a change in its character. However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

Smith cites to *State v. Roche*, 144 Wn. App. 424, 59 P.3d 682 (2002) to support her argument that chain of custody was not sufficiently established in her case. *Roche* is distinguishable. *Roche* is a case where the forensic scientist was stealing portions of the drugs he was testing and diverting them for his personal use, which he was partaking in while working. *Roche*, 114 Wn. App. at 428-31. This Court did caution that when evidence is not as readily identifiable and is susceptible to tampering or alteration, it is more customary to have each person in the chain of custody testify. *Id.* at 436.

There are several factors that should be considered in regards to whether the more stringent chain of custody test is necessary including, “the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration.” *Id.* at 436. This Court in *Roche* acknowledged, “[t]he proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution.” *Id.*, citing *Campbell*, 103 Wn.2d at 21. The Court adhered to the long standing principle that discrepancies or uncertainties go to weight not admissibility. *Id.*

The chain of custody issues in *Roche* were related to the forensic scientists' credibility which was completely devastated due to his malfeasance. *Id.* at 437. This Court reasoned that due to the scientist's sloppy work, dishonesty and drug use, the jury could have called into question not only his testing of the drugs but also his preservation of the chain of custody. *Id.* There is no such issue in Smith's case. There has been no allegation of any malfeasance towards any member who had custody of Item 1, the bag, whether that be Officer Thayer, Officer Frank, Ms. Price, the evidence custodian at the Chehalis Police Department, or evidence custodian for the Washington State Crime Laboratory. *Roche* does not apply to Smith's case.

In Smith's matter Officer Frank testified she recovered what she described as a clear bag from Smith during Smith's strip search at the Lewis County Jail. RP 74-75. Officer Frank testified that while the bag did possibly have stars on it, she considered it clear because you could see through the baggie. RP 79-80. The bag was stuck to Smith's breast and Smith handed the bag directly to Officer Frank. RP 75. Officer Frank had her coworker call the Chehalis Police Department and request they return to pick up the bag. RP 75.

Officer Frank immediately took the bag and locked it in her secure gun locker. RP 75-76. Officer Frank explained she has the key to the gun locker, she wears the key on her belt, and it is where she keeps her firearm. RP 76. The locker must be locked at all times, which is why Officer Frank placed the bag in the locker. RP 76. General coworkers do not have access to Officer Frank's gun locker, but management would have a key to the locker. RP 76-77. There was no other evidence in the locker prior to Officer Frank placing the bag in her gun locker, nor was there any other evidence placed in the locker prior to the bags removal. RP 76, 82.

Officer Thayer testified that after dropping Smith off at the Lewis County Jail and leaving the jail she received a message about a small plastic bag, containing a brown tar-like substance, that was found on Smith back at the jail. RP 48. Officer Thayer returned to the jail to pick up the bag. RP 48-49. Officer Thayer met with Officer Frank at the Lewis County Jail. RP 49. Officer Frank took Officer Thayer over to Officer Frank's gun locker in the booking area. RP 49. According to Officer Thayer's testimony, Officer Frank unlocked her gun locker with a key and handed the bag directly to Officer Thayer. RP 49.

Officer Thayer testified that Identification 3,⁴ later admitted as Exhibit 3, was the small plastic bag Officer Frank handed Officer Thayer. RP 50, 54. Officer Thayer labeled Exhibit 3, with the case number for this case, Smith's name, and it is all in Officer Thayer's handwriting and she signed it. *Id.* Officer Thayer sealed Exhibit 3. *Id.* At the time of her testimony at trial, Officer Thayer saw no evidence of tampering with the seal she placed on Exhibit 3. *Id.* Inside the plastic evidence bag is the small plastic bag that had a brown tar-like substance in it. RP 50. Exhibit 3 was sent to the crime laboratory for testing. RP 51, 54. Exhibit 3 has the crime laboratory number on it. RP 51, 54; Ex. 1. Exhibit 3 is marked as Item 1 on the Washington State Crime Laboratory Report, Exhibit 1. RP 52; Ex. 1.

Officer Thayer explained that to send items to the crime laboratory for testing, Officer Thayer creates a laboratory request form. RP 64. Officer Thayer then sends the laboratory request form to her evidence technician, outlining the items, the suspect, the circumstances, and the case number. RP 64. The evidence technician then collects the items that were placed into evidence and sends the items to the crime laboratory to be tested. RP 64.

⁴ The State will refer to Exhibit 3 exclusively as Exhibit 3 or Item 1 from this point forward instead of Identification 3, even if that is the direct testimony from the witness, to avoid confusion.

Ms. Price from the Washington State Crime Laboratory in Tacoma explained how Item 1 (Exhibit 3) was received and returned by the crime laboratory and how the material is handled once at the crime laboratory. 99-100; 107-08.

Items come into the laboratory by secure carrier or they're carried in by a representative typically from law enforcement agencies. In this case they originally were sent to the Vancouver crime laboratory. They were transferred to the Tacoma crime laboratory by FedEx, and then after my analysis they were sent back via UPS to the agency, to Chehalis Police Department.

When they come into the laboratory, they're assigned their unique laboratory case number. The property and evidence custodians check the seals to make sure the items have intact seals. They're assigned that unique laboratory case number, and then they are placed into a secure evidence vault which only the property and evidence custodians, supervisors and laboratory manager have access to.

When I'm ready to analyze the evidence, I check the materials out from the vault using a secure transfer with a PIN number. I analyze materials at my laboratory area and then return them to that vault when I've completed my analysis. After the report is issued, the evidence custodians return the evidence and the report to the agency.

RP 99-100. When questioned by Smith's counsel how Ms. Price was sure the items were not tampered with during the shipping process the following exchange occurred:

Q. Okay. Is there any type of, I guess, checks to make sure that the items weren't tampered with during those shipping processes?

A. The seals are checked when it first comes into the original laboratory. When it came into the Vancouver laboratory, they check the seals before they assign it a case number there and enter it into evidence.

When it was transferred to the Tacoma laboratory, our property custodians also check the seals when they receive it in Tacoma, and then I check the seals when I check it out of the vault. Before I conduct my analysis, I apply my seal again. And then our custodians check all the seals before they mail it back to the agency.

Q. Are they tamper evidence seals, or how does that work? Yes, they are.
And how what would -- how would you know if they had been tampered with?

A. The blue tape, if you stretch it, you can't get it to go back to its original shape, so it looks stretched out.

Q. How about the original evidence bags?.

A. The original evidence bags have that gum seal, which, again, if you were to stretch that out to try to break it, you wouldn't be able to reapply it.

Q. Okay.

A. You wouldn't be able to reseal it.

Q. Any way that you could chemically alter that or any other way it could be unsealed without it being evident?

A. Not that I'm aware of.

RP 108-09.

An attorney's decision regarding whether and when to object generally falls within the category of tactical decisions. *State v.*

Rafay, 168 Wn. App. 734, 841, 285 P.3d 83 (2012). In this matter, the State presented sufficient evidence to establish chain of custody. Admittedly the chain was not unbroken, but that goes to weight in Smith's case, not admissibility, as her trial counsel well knew. The State had Officer Frank's testimony that she placed a bag from Smith in her locker. There was the testimony from Officer Thayer that Officer Frank took Officer Thayer directly to the gun locker, opened it with Officer Frank's key, and Officer Frank handed Officer Thayer the bag. Officer Thayer then placed the bag into another clear plastic evidence bag and sealed it, initialed it, wrote Smith's name on it, and the case number. At trial Officer Thayer testified that her seal was still intact. RP 50. The only change to the bag was the addition of the crime laboratory evidence tape, with their crime laboratory number. RP 51. Ms. Price testified that the item had not been tampered with. RP 100-01. This sufficiently establishes chain of custody for admission of the evidence. There was no reason for Smith's counsel to raise an objection that had no basis and would not have been sustained. Smith's counsel was free to argue the chain of custody issues in regards to the weight to place on the evidence, and he did, in his closing argument. RP 122-24. Smith's trial counsel was not deficient in his representation of Smith.

3. Even If Smith's Attorney Was Deficient For Failing To Object To The Admission Of Exhibit 3 For Failure To Sufficiently Establish Chain Of Custody, Smith Suffered No Prejudice.

As argued above, there is nothing to show that Smith's trial counsel's performance was deficient. Arguendo, if this Court were to find it was deficient performance for trial counsel to fail to object to the admission of Exhibit 3 based upon chain of custody, the lack of objection did not prejudice Smith. Smith has to show this Court there is a reasonable probability that the result of the proceedings would have been different but for Smith's counsel's failure to object. Smith cannot meet that burden. *Horton*, 116 Wn. App. at 921.

Smith simply states, if counsel had objected and the objection had been sustained, then there would be no evidence that she possessed heroin. Brief of Appellant 9. The State agrees, if such an objection would have been sustained then Smith would be prejudiced. But all evidence in this case is contrary to Smith's conclusory statement. The trial judge, when rendering her verdict, explained chain of custody in detail. RP 126-27. The trial judge stated, "There was a clear chain of custody here, even though it's not in report, and I do take very serious notice of those things in weighing the credibility of the witnesses, but I think of all the circumstances

and all of evidence as a whole here, I think there was a very strong chain of custody.” RP 126. The trial judge would not have sustained an objection to the admission of Exhibit 3 based on lack of chain of custody. Therefore, Smith cannot show with reasonable probability that result of the proceedings would have been different if her attorney had objected. Smith’s ineffective assistance of counsel claim fails. This Court should affirm her conviction.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT’S FINDING THAT SMITH COMMITTED THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE – HEROIN.

Contrary to Smith’s assertion, the State did prove that she did possess heroin, a controlled substance. Smith argues the evidence presented was insufficient to prove that Item 1, which tested positive for heroin, was the same substance that was taken from Smith’s person. Brief of Appellant 10. Smith glosses over the facts, ignores Officer Thayer’s testimony regarding retrieval of the bag, and fails to use the correct standard of review. This Court should find the State presented sufficient evidence to sustain the trial court’s finding of guilty for Possession of a Controlled Substance – Heroin and affirm the conviction.

1. Standard Of Review.

Sufficiency of evidence following a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court’s conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Unchallenged findings are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

2. The Trial Court’s Conclusion That Smith Possessed A Controlled Substance – Heroin Is Supported By The Evidence.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true.” *Smith*, 185 Wn. App. at 956 (citation omitted). The reviewing court defers to the trier of fact on issues regarding witness credibility, conflicting testimony, and persuasiveness of the evidence presented. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Smith assigns error to Finding of Fact 1.18 and 1.22, therefore, the remaining unchallenged findings of fact are verities on appeal. *Lohr*, 164 Wn. App. at 418; See CP 16-19. Smith also assigns error to Conclusion of Law 2.2. The State’s evidence outlined below is substantial evidence that supports the challenged findings of fact.

To convict Smith of Possession of a Controlled Substance – Heroin, the State was required to prove, beyond a reasonable doubt, that Smith, on or about January 12, 2017, in the State of Washington, did possess a controlled substance, to-wit: heroin. RCW 69.50.4013; RCW 69.50.204(b)(11); CP 1. Smith argues there was insufficient evidence she possessed heroin. Brief of Appellant 10. Smith bases her argument off her failed argument regarding lack of chain of custody. *Id.* Smith argues the lack of Officer Frank’s memory giving the bag to Officer Thayer, Officer Thayer’s lack of memorializing

retrieval of the item in a police report, neither officers recalling the bag had stars on it, that the bag went to two crime labs but no one testified from the first crime lab how it was sent to the second crime lab all show there was insufficient evidence that the bag the Crime Laboratory tested that yielded a positive result for heroin was the same bag Smith possessed. *Id.*

Smith's argument fails as she does not apply the appropriate standard of review in her analysis of the evidence. Smith must admit the truth of the State's evidence. *Goodman*, 150 Wn.2d at 781. Smith must also view the evidence with all reasonable inferences drawn in favor of the State. *Id.* Further, the reviewing court defers to the finder of fact regarding witness credibility. *Thomas*, 150 Wn.2d at 874-75. Smith fails to address the evidence presented under these standards. See Brief of Appellant 10.

Officer Frank testified that she collected the bag directly from Smith. RP 74-75. Officer Frank immediately placed the bag in her locked gun locker and had Chehalis Police Department notified by one of Officer Frank's coworkers. RP 75-76. There was no other evidence in the locker prior to or during the time that the bag was in Officer Frank's gun locker. RP 76, 82.

Officer Thayer testified that she received a message about the bag and returned to the jail to retrieve the evidence. RP 48. Officer Thayer testified that she met with Officer Frank who took Officer Thayer over to Officer Frank's gun locker in the booking area. RP 49. Officer Frank then unlocked the gun locker with her key, handed Officer Thayer the bag, which Officer Thayer then placed into another plastic evidence bag. RP 49, 50, 54. That evidence bag, with the other bag inside of it, was Exhibit 3, also known as Item 1, and Officer Thayer labeled it with the case number, Smith's name, Officer Thayer signed it, and sealed the Exhibit. RP 50, 54. There was no evidence of tampering with the seal that Officer Thayer had placed on the plastic evidence bag, Item 1 (Exhibit 3). *Id.*

It was explained by Officer Thayer that the bag was stored at the Chehalis Police Department in their secure evidence facility and sent to the crime laboratory by their evidence technician. RP 64, 69. Ms. Price explained the procedures that occur in the Washington State Crime Laboratory regarding the handling of evidence that is sent to it for testing. RP 99-100. Ms. Price explained that Item 1 (Exhibit 3) was sent to the Vancouver Crime Laboratory by certified mail – USPS, transferred to the Tacoma Crime Laboratory by FedEx, and sent back to the Chehalis Police Department by UPS. RP 107-

08. Ms. Price also testified that the evidence still bared her evidence tape, with her writing, and Item 1 did not appear to have been tampered with. RP 100-01, 108-09. Item 1 tested positive for heroin. RP 104; Ex. 1.

Therefore, when viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, there was substantial evidence to support the trial court's conclusion that Smith possessed heroin on January 12, 2017. CP 19. Therefore, this Court should affirm the trial court's conclusions of law, find in the light most favorable to the State, there was substantial evidence presented to find sufficient evidence of Possession of a Controlled Substance – Heroin and affirm Smith's conviction.

C. THE STATE CONCEDES THE TRIAL COURT'S INQUIRY OF SMITH'S ABILITY TO PAY HER DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WAS INSUFFICIENT.

Smith argues the trial court failed to fully engage in an individualized inquiry regarding Smith's ability to make payments on her legal financial obligations before imposing costs and fees. Brief of Appellant 11-12. The trial court's consideration was not satisfactory, it did not ask Smith about her assets, debts, or other financial obligations. See SRP 7-8. The correct remedy is to remand

this case back to the trial court for the judge to conduct the required inquiry.

1. Standard Of Review.

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

2. The Trial Court’s Inquiry Was Not Sufficient For An Individualized Determination That Smith Had The Ability To Pay The Discretionary Legal Financial Obligations.

Smith was ordered to pay \$500 victim penalty assessment; \$200 filing fee; \$700 court appointed attorney fee; \$100 DNA fee; \$100 crime lab fee; and \$1,000 VUCSA fine. CP 25. The DNA fee, crime victim assessment, and filing fee are all mandatory fees. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). The court appointed attorney fee, VUCSA fine, and crime lab fee are discretionary.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.*

Here the trial court simply asked Smith if she had the ability to work when she was not in custody, what type of work she had done before, and when the last time she worked had been. SRP 7. There was no inquiry into Smith's assets, her financial obligations, and what debts she may have. *Id.* The trial court did not meet its obligation

prior to imposing the attorney's fees, VUCSA fine, and crime lab fee.

This Court should remand so the proper inquiry may be made.

IV. CONCLUSION

Smith received effective representation from her trial counsel. There was no issue surrounding the chain of custody of Exhibit 3 that would warrant an objection from Smith's trial counsel. There was sufficient evidence presented to establish Smith Possessed a Controlled Substance - Heroin. The State concedes the trial court's inquiry regarding Smith's ability to pay her legal financial obligations was not sufficient. Therefore, this Court should affirm Smith's convictions but remand the case to the trial court for the proper inquiry regarding her legal financial obligations.

RESPECTFULLY submitted this 22nd day of December, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

December 22, 2017 - 2:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50264-0
Appellate Court Case Title: State of Washington, Respondent v. Skylar R. Smith, Appellant
Superior Court Case Number: 17-1-00029-3

The following documents have been uploaded:

- 502640_Briefs_20171222135900D2924004_6846.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Smith.sky Response 50264-0.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- jfreem2@co.pierce.wa.us

Comments:

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20171222135900D2924004